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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 100

W. P. BROWN & SONS LUMBER COMPANY, ET AL.,
Petitioners,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
ET AL.,
Respondents.

BRIEF FOR RESPONDENTS.

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Respondents.

BRIEF FOR RESPONDENTS.

STATEMENT.

Petitioners (who were plaintiffs in the District Court), filed this suit in the District Court under Paragraph (2) of Section 16 of the Interstate Commerce Act (49 U. S. C. A., Sec. 16 (2)), to recover reparation under an award (R. 24-27) of the Interstate Commerce Commission dated February 9, 1932 in the proceeding known as *Wausau Southern Lumber Co. et al.* v. *Alabama Great Southern Railroad Co. et al.* The decisions of the Commission in this proceeding are reported in 142 I. C. C. 521 (R. 40) and 182 I. C. C. 731 (R. 13).

The case as finally decided by the Commission involved no question of administrative discretion on its part. The

question, solely one of law, was whether these respondent railroads had lawfully construed the language of the rule in their tariffs commonly known as the combination rule, the words in which rule were used in their ordinary sense.

The Commission found that these respondents had placed an unlawful construction on the rule, had collected more than the applicable rates, and the Commission awarded reparation for the amount of the overcharges.

These respondents filed an answer (R. 27) to the original petition (R. 1), and later filed an amendment to their answer (R. 54). Petitioners also filed an amendment to their petition (R. 35). Petitioners filed a demurrer (R. 64) to the answer and to the answer as amended, and these respondents filed a demurrer (R. 63) to the petition as amended.

The District Court, following an argument before it on the demurrers, reached the conclusion (memorandum opinion R. 65, 7 Fed. Supp. 593), that the Commission's reparation order upon which the action was based was founded upon an incorrect interpretation of the combination rule and that the petitioners were not entitled to reparation in that action upon the award of reparation made by the Commission. The court sustained the respondents' demurrer to the petition as amended, and overruled petitioners' demurrer to Paragraph III of the answer as amended (R. 67), and from this decision an appeal was taken to the United States Circuit Court of Appeals for the Sixth Circuit. That court affirmed the decision of the District Court (R. 74, 82 Fed. (2d) 94).

This Court granted a writ of certiorari on October 12, 1936 to the Circuit Court of Appeals for the Sixth Circuit.

The circumstances that have given rise to this litigation are as follows:

The shipments of lumber covered by the Commission's

order of reparation in this case moved from points of origin in the South and the Southwest to destinations in the North (R. 42). At the time the shipments moved published through rates on lumber (sometimes referred to as "joint" or "single factor" through rates, as in the Commission's report, R. 43), were in effect from the points of origin of all these shipments to their destinations (answer R. 31, amendment to answer R. 55, Commission's report R. 43). These published through rates were restricted to apply via certain routes specified in the tariffs (Commission's report R. 43). There was no question in the case respecting the reasonableness of the rates, the Commission pointing out (R. 42) that all allegations with respect to the reasonableness of the rates were withdrawn at the hearing with an exception not pertinent here. Nor was there any question in the case respecting the reasonableness of the routes over which these published through rates applied. There was no contention that the routes over which the published through rates applied were insufficient in any respect or were inadequate.

But there is such a multiplicity of carriers and routes from the lumber-producing territory in the South and the Southwest to the vast consuming territory in the North, that it is possible to work out many routes, composed of portions of the lines of the various carriers, over which the published through rates did not apply under the specific routing provisions contained in the tariffs naming those rates. The lawful rate applicable to the shipments of lumber moving over the routes over which the published through rates were not applicable would be the combination of the local rates of the carriers making up that route. The combination was higher than the published through rate.

Paragraph (1) of Section 6 of the Interstate Commerce

Act (49 U. S. C. A., Sec. 6 (1)) recognizes the distinction between a joint rate, that is to say, a published through rate that applies over the line of two or more railroads, and through rates that are made up of separately established local rates. Paragraph (1) of Section 6 provides that every common carrier subject to the Act shall file with the Commission and print and keep open for public inspection schedules showing all the rates for the transportation between different points on its own route and between points on its own route and points on the route of any other carrier when a through route and a joint rate have been established. It goes on to provide, however, that if no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open for public inspection, the separately established rates applicable to the through transportation.

There is no requirement in the Interstate Commerce Act that the rate via every route between two points must be the same, or that carriers must establish a joint rate, that is to say, a published through rate, via every route between any two points. It would indeed be impracticable to establish through, single-factor rates, from each and every station in the United States to every other station via each of the myriad routes that can be worked out between such stations. The Interstate Commerce Commission, however, is given the power under Paragraph (3) of Section 15 of the Interstate Commerce Act (49 U. S. C. A., Sec. 15 (3), Appendix A), whenever the Commission deems it necessary or desirable in the public interest, after a full hearing, to establish through routes and joint rates. The Commission itself has said[1] that the law does not require it to establish through routes and joint rates in all instances where carriers have neglected

(1) *New York Dock Railway* v. *Baltimore & Ohio Railroad Co.*, 32 I. C. C. 568, p. 573.

or refused to do so, but empowers the Commission to do so in proper cases. Petitioners, as can be seen from a reading of the Commission's reports in the case at bar (R. 40, 13), did not invoke the power that the Commission possesses under Paragraph (3) of Section 15, and raised no question regarding the reasonableness *per se* of the routes, their sufficiency or their adequacy.

The carriers in the past years, in order to meet the rising tide of expenses, have increased their rates pursuant to the authority of the Director General of Railroads (General Order No. 28) or the Interstate Commerce Commission (*Increased Rates*, 1920, 58 I. C. C. 220). As pointed out by the petitioners in the amendment to their petition (R. 38), under General Order No. 28 the lumber rates were increased 25 per cent, subject to a maximum of 5 cents per 100 pounds in any rate, that is to say, there was to be applied to each and every rate on lumber in the United States an increase of 25 per cent but not exceeding an increase of 5 cents per 100 pounds.

It can readily be seen that where a shipment moved via a route over which there was in effect one published through rate, that rate would be increased but once and by 5 cents per 100 pounds, but that if the shipment moved over a route the rate over which route was made up of the combination of the separately established local rates of the carriers making up the through route, each local rate would be increased 5 cents per 100 pounds, and thus a shipper under these circumstances would pay double and sometimes triple increases in the rates.

There are many small and unimportant stations located on the lines of the railroads in the United States, and as we have heretofore pointed out, it is not practicable to publish through rates from each and every station in the United States to every other station, irrespective of size and importance. And as we have seen, the Interstate Com-

merce Act does not contemplate or require it, for it gives the Commission the power to determine in any case whether the railroads should be required to establish through routes and joint rates.

In order to avoid such an inequality in rates as between shippers, and in order to insure that shippers located at points of origin from which no published through single-factor rates were in effect would pay but one increase, just as shippers located at points from which published through single-factor rates were in effect would pay but one increase, the Director General of Railroads devised what is commonly known as the combination rule. As stated by the Commission itself in its original report in this proceeding (R. 45):

> "The combination rule was originally published by the Director General about seven months after the issuance of General Order No. 28, as an emergency tariff provision to avoid a double increase on certain commodities moving on combination rates, the separate factors of which had been increased by specific amounts. Shortly after the general increase of 1920 the rule was amended substantially to reflect the increases then authorized. It was subsequently further amended to reflect the general reduction of 1922, and is still in effect. * * *"

The facts surrounding the publication of the combination rule are set forth at somewhat greater length in the amendment to the petition (R. 38, 39), and in the amendment to the answer (R. 54-61). Four Circuit Courts of Appeal have recently had occasion to consider the language of the combination rule for the purpose of determining whether the Commission erred as a matter of law in construing the language, and in the decisions of these courts will be found a detailed description of the rule and its purpose.[1]

(1) *Baltimore & Ohio Railroad Co.* v. *Domestic Hardwoods, Inc.*, 65 Fed. (2d) 488; *Hohenberg* v. *L. & N. R. R. Co.*, 46 Fed. (2d) 952, certiorari denied 284 U. S. 617; *Hygrade Food Products Corp.* v. *C. M. St. P. & P. R. R. Co.*, 85 Fed. (2d) 113; *Wheelock et al.* v. *Walsh Fire Clay Products Co.*, 60 Fed. (2d) 415.

We shall consider these cases later.

As stated by the Court of Appeals for the Second Circuit in one of these cases, the *Hygrade Corporation case*, 85 Fed. (2d) 113, (p. 114):

> "* * * The flat increase was fair enough when applied to a local rate or a one-factor through rate between the points of origin and destination but resulted in duplication of the increase when the through rate was a combination of 'factors' (intermediate rates) to each of which the increase was applied. To remedy this, a formula was devised for constructing combination rates by which the increase granted was less than the aggregate of the increases on the several constituent rates or factors. * * *"

The pertinent portion of the combination rule reads as follows (R. 58, 59):

> "Where no published through rates are in effect from point of origin to destination on Lumber * * * carloads, and two or more commodity rate factors * * * are used in arriving at the through rate for a continuous rail shipment thereof, such through rate will be arrived at in the following manner * * *"

Then follows the formula for determining the combination through rate and the single increase to be added to that combination through rate (R. 45, 46, 58-60). It is obvious that the whole purpose of the rule was to insure that shippers located at points of origin, from which points of origin via the railroads serving such points no published through rates were in effect, would pay but one increase in the rate.

It is to be borne in mind that at the time the shipments of lumber involved in this controversy moved, published through rates applying on such shipments were in effect from the points of origin of these shipments to their destinations, and that those published through rates included therefore but one increase in the rates.

The respondents in the amendment to their answer (R. 54-60) have set forth the rate situation by the use of a

concrete example of a rate from a typical lumber producing point (Laurel, Mississippi) to a typical point of destination (Columbus, Ohio). The published through rate from Laurel to Columbus, applying from Laurel via each of the originating carriers at that point was 43c per 100 pounds. The combination rate unaffected by the combination rule, applying over routes over which the published through rate did not apply, was 43½c, or ½c more than the published through rate of 43c. If this combination rate of 43½c is treated by the combination rule, the rate would be 40½c.

The petitioners therefore brought their complaint before the Commission to obtain a refund of the overcharges which they contended the carriers had collected on the shipments that moved over the routes over which the combination basis of rates was in effect. The petitioners contended, in the case of the example just referred to, that the lawful rate was 40½c and not 43½c, and that they had been overcharged by 3c.

The Interstate Commerce Commission found that the construction placed by the carriers upon the combination rule was erroneous as a matter of law, that the combination rule applied on these shipments, notwithstanding the fact that published through rates were in effect from all the points of origin of these shipments. The Commission further found that the charges that had been collected by the carriers on the shipments of lumber involved in this case were over and above the charges lawfully applicable thereto, (a violation of Paragraph (7) of Section 6 of the Interstate Commerce Act, 49 U. S. C. A., Sec. 6 (7) Appendix B), and these respondents were directed by the Commission's order of February 9, 1932 (R. 24) to pay to petitioners the amount of the overcharges.

If the Commission was right in its construction of the combination rule, the respondents were also chargeable

with misrouting with respect to certain shipments, in that they either failed to forward the shipments via the routes designated by the petitioners, over which the combination basis of rates applied, and which basis when modified by the use of the combination rule produced somewhat lower rates than the published through rates, or failed, where there were no routing instructions, to forward the shipments via such routes. This aspect of the case was referred to by the District Court in the third paragraph of its memorandum opinion (R. 65). The liability of the respondents in each case, however, depends upon whether the Commission erred in its construction of the combination rule. If the Commission erred in the interpretation it placed upon the rule, there was no misrouting. The Commission itself said in its report (R. 42) that the alleged misrouting was dependent upon the tariff interpretation, and that this question of tariff interpretation presented the principal question for determination.

Some of the northern railroads paid the award of reparation in accordance with the order of the Commission on the shipments that were delivered by such railroads. Other railroads, including principally the railroads in the Southern Territory that originated the shipments, the respondents here before this court, believing that the Commission's construction of the combination rule was plainly erroneous as a matter of law and that no overcharges were due these petitioners, refused to pay the award of reparation directed against them, following which this suit was brought in the District Court to recover on the unpaid portion of the award made by the Commission.

SUMMARY OF ARGUMENT.

The first question to be determined is whether the decision of the Interstate Commerce Commission is conclusive and binding upon the courts. The petition and amended petition filed by the petitioners in the District Court (R. 5, 35), and the Commission's opinions (R. 13, 40), show that the Commission did not have before it in the case at bar any question calling for the exercise of its administrative discretion, that it was not called upon to consider any question respecting the reasonableness of rates or routes, that on the contrary, it had before it for construction a rule in a railroad freight tariff, the words in which were all used in their ordinary sense. The construction of the rule requires no technical or expert knowledge. The question was solely one of law, and while deference will be paid to the Commission's conclusions on such a question, the courts are not bound by them.

The second question is whether the Commission was right in the construction it placed upon the combination rule. The rule provided that where no published through rates were in effect from the point of origin to destination, and combination rates were used in arriving at the through rate, the through combination rate would be arrived at in the manner provided for in the rule. Published through rates were in effect from the points of origin to the points of destination of all the shipments covered by the Commission's order of reparation in this case. The condition in the rule having been met, it follows that under the plain language of the rule it may not be applied to the shipments of lumber involved in this proceeding.

The language of the combination rule is clear and unambiguous. No word in the rule is used in other than its ordinary sense. The rule means just what it says and ought to be interpreted just as it reads. There is nothing technical about the rule. It is clearly and simply stated in simple language. The language of the rule is so clear and its meaning so plain that no difficulty attends its construction. The Commission is bound by the words employed.

The courts below in the case at bar were justified in refusing to follow the decision of the Court of Appeals of the District of Columbia in *Baltimore & Ohio Railroad Company* v. *Domestic Hardwoods, Inc.*, 65 Fed. (2d) 488, in which the Court of Appeals placed the same construction upon the combination rule as did the Commission in the case at bar. The Court of Appeals sustained the Commission's construction on the ground that it was conceivable that through routes might be established over longer routes and through congested centers which would increase cost and delay delivery, and that the construction placed by the Interstate Commerce Commission upon the combination rule would prevent the establishment of such unreasonable routes and rates.

The Court of Appeals in the *Baltimore & Ohio case* overlooked the fact that the power which the Interstate Commerce Commission has to require the establishment of through routes and joint rates is not found in its power to construe tariffs and to determine applicable rates, but is found in the power vested in it by Paragraph (3) of Section 15 of the Interstate Commerce Act (49 U. S. C. A., Sec. 15 (3)), which authorizes the Commission to require carriers to establish additional through routes whenever the Commission finds such through routes necessary or desirable in the public interest, and to fix the rates over such routes. Petitioners in the case at bar raised no issue before the Commission respecting the reasonableness of the routes,

and did not invoke the exercise of the Commission's power under Paragraph 3 of Section 15.

It is clear, moreover, that the Court of Appeals recognized that it would have no great difficulty in accepting the carriers' view on the interpretation of the combination rule were it not a question as to which the Commission had made a ruling, and it followed the Commission's ruling on the theory that the question involved a technical subject as to which the Commission was presumed to have expert knowledge, superior to that of the court.

The Circuit Court of Appeals in the case at bar was right, in its conclusion (R. 79) that it perceived no inherent technical question in determining whether the rule means what it says, and it was justified in refusing to follow the reasoning of the Court of Appeals in the *Baltimore & Ohio Case*. It was the conflict between the decision of the Court of Appeals in the *Baltimore & Ohio Case* and the Circuit Court of Appeals in the case at bar that was the principal ground urged by the petitioners in their application for a writ of certiorari.

Three different Circuit Courts of Appeal have recently held that the Interstate Commerce Commission erred as a matter of law in failing to construe another portion of this same combination rule in accordance with the plain meaning of the language used. The principle applied by these three Circuit Courts of Appeal that the rule should be construed in accordance with the plain meaning of the language used, has equal application to this case. As was well stated by the court in *Hygrade Food Products Corporation* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Company*, 85 Fed. (2d) 113 (p. 116), the construction of the rule involved words in their ordinary meaning and required no technical or expert knowledge possessed by the Interstate Commerce Commission.

The fact that the Interstate Commerce Commission had long construed the combination rule as it did in the case at bar is not controlling where that construction is contrary to the plain meaning of the rule. It is elementary that where no ambiguity exists there is no room for construction. The question is not what construction the rail carriers or some of them at one time may have placed upon the combination rule, but the lawful construction of that rule. Petitioners point out a great many cases decided by the Interstate Commerce Commission which but illustrate the long-continued opposition of these respondents to the construction placed by the Commission upon the rule.

The construction placed by the Commission upon the combination rule would have resulted in violations of the long-and-short-haul clause of Section 4 of the Interstate Commerce Act (49 U. S. C. A., Sec. 4). And if it be assumed that any possible doubt can arise with respect to the meaning of the rule, it is clear that the Commission erred in adopting that construction which would have resulted in a violation of law.

ARGUMENT.

THE SOLE QUESTION BEFORE THE INTERSTATE COMMERCE COMMISSION WAS THE CONSTRUCTION TO BE PLACED UPON WORDS IN A TARIFF RULE USED IN THEIR ORDINARY MEANING. THIS WAS A QUESTION NOT OF FACT BUT OF LAW.

THE QUESTION DID NOT CALL FOR THE EXERCISE OF THE ADMINISTRATIVE DISCRETION OF THE COMMISSION. PRELIMINARY RESORT TO THE COMMISSION WAS NOT REQUIRED AND ITS DECISION THEREFORE IS NOT BINDING OR CONCLUSIVE ON THE COURTS.

As stated by the Circuit Court of Appeals in its opinion in the case at bar (R. 76):

> "The first question to be determined is the conclusiveness of the Commission's award. If the question were one of fact, or involved the exercise of

administrative discretion, we are bound by the decision."

The Commission's original report, 142 I. C. C. 521 (R. 40), its findings (R. 49, 50), and its report on further hearing, 182 I. C. C. 731 (R. 13), in this proceeding, show on their face that the Commission did not decide any question involving the exercise of its administrative discretion. The Commission did not consider and dispose of any issues respecting the reasonableness of the combination rule itself, the reasonableness of rates under Section 1 of the Interstate Commerce Act, or unjust discrimination under Section 2, or undue preference under Section 3 (49 U. S. C. A. Secs. 1, 2, and 3), issues which present questions of fact requiring the prior determination of the Commission. Nor did the Commission pass upon or consider any question regarding the reasonableness of the routes over which the published through rates or the combination rates applied, a question also requiring prior determination of the Commission. These petitioners raised no question before the Commission respecting the reasonableness of the routes and did not invoke the power that the Commission has under Paragraph (3) of Section 15 of the Interstate Commerce Act (49 U. S. C. A. Sec. 15 (3), Appendix A), to establish through routes when it finds such through routes necessary or desirable in the public interest, and to fix reasonable rates for application over such routes.

The sole question, on the other hand, decided by the Commission was the lawful construction of a rule in a railroad freight tariff. The Commission construed the language of the combination rule, held that the carriers had placed an unlawful construction upon the rule, had collected more than their published tariff rates, and had thus violated Paragraph (7) of Section 6 of the Interstate Commerce Act (49 U. S. C. A. Sec. 6 (7), Appendix B).

If the Commission was right in its construction of the rule, the carriers, as we have heretofore pointed out, were also chargeable with misrouting with respect to certain

shipments. If the Commission was wrong, there was no misrouting.

The Commission, in passing upon the sole question disposed of by it, construed the tariff rule, and determined what the applicable rates were under the construction placed by it upon the tariff rule (R. 49).

There was no dispute between the parties as to the facts. The case did not call for a consideration and weighing of conflicting evidence. The only dispute was as to how the tariff rule should be read, interpreted and applied. The petitioners, if they had chosen to do so, could have brought this suit in the first instance in a District Court for the purpose of having the court determine the lawful construction of the combination rule (*Section 9 of Interstate Commerce Act,* 49 U. S. C. A. Sec. 9; *Standard Oil Co. of Indiana* v. *United States,* 283 U. S. 235).

We are thus met with the question of the weight to be given by the court to the conclusions of the Commission on a matter of law. Must the court accept those conclusions as conclusive, or may it determine the question of law unshackled and untrammelled by what the Commission has found? The answer to this question is found in the decisions of the Supreme Court of the United States and the Federal courts.

In *Great Northern Ry. Co.* v. *Merchants' Elevator Co.,* 259 U. S. 285, this Court had before it a judgment of the Supreme Court of Minnesota affirming a judgment of the lower court for the plaintiff in a suit against an interstate carrier for $80 overcharges, exacted in violation of certain provisions of the carrier's tariff. There was no dispute concerning the facts, and the question argued before this Court was not whether the State court erred in construing or applying the tariff, but whether that court had any jurisdiction of the controversy, in view of the fact

that the Commission had not passed upon the disputed question of construction (p. 290).

This Court said that where the document to be construed is a tariff of an interstate carrier, and before it can be construed it is necessary to determine upon evidence the peculiar meaning of words, or the existence of incidents alleged to be attached by usage to the transaction, the preliminary determination must be made by the Commission, and that not until this determination has been made can a court take jurisdiction of the controversy. But this Court after stating (p. 293) that it may happen that there is a dispute concerning the meaning of a tariff which does not involve, properly speaking, any question of construction, and that the dispute may be merely whether words used in the tariff were used in their ordinary meaning or in a peculiar meaning, and that this was the situation in *Texas & Pacific Ry. Co.* v. *American Tie & Timber Co.*, 234 U. S. 138, and *Loomis* v. *Lehigh Valley R. R. Co.*, 240 U. S. 43, said (p. 294):

> "In the case at bar the situation is entirely different from that presented in the *American Tie & Timber Co. Case*, or in the *Loomis Case*. Here no fact, evidential or ultimate, is in controversy, and there is no occasion for the exercise of administrative discretion. The task to be performed is to determine the meaning of words of the tariff which were used in their ordinary sense and to apply that meaning to the undisputed facts. The operation was solely one of construction; and preliminary resort to the Commision was, therefore, unnecessary. * * *"

The task before the Court in this proceeding is precisely the same as the task before the Minnesota Supreme Court in the case just cited: to determine the meaning of words of the tariff that were used in their ordinary sense, and to apply that meaning to the undisputed facts.

The combination rule contains no words used in a peculiar meaning, no words used in other than their ordinary

sense, no words, extrinsic evidence with respect to which is necessary to determine the sense in which they are used, and no words that a court cannot readily and easily understand without prior interpretation by the Commission.

The language of the Circuit Court of Appeals for the Second Circuit is *Hygrade Food Products Corporation* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Company,* 85 Fed. (2d) 113, in which the court held that the Commission erred as a matter of law in construing another part of this same rule, has equal application to the case at bar. The court said that the construction of the combination rule involves words used in their ordinary meaning and requires no technical or expert knowledge possessed by the Interstate Commerce Commission, and that under these circumstances courts are at liberty to decide independently of the Commission. (p. 116.)

To the same effect is *Wheelock et al.* v. *Walsh Fireclay Products Co.* (C. C. A. 8), 60 Fed. (2d) 415, p. 418.

Petitioners, in seeking to argue (p. 16) that preliminary resort to the Commission was not only proper but necessary, would turn this case before this Court into an entirely different kind of case from the case the petitioners made before the Commission. Petitioners suggest (p. 19) that whether an interpretation should be adopted which would result in a commercial closing of numerous routes which have long been in existence, was certainly an administrative question requiring serious consideration by the Commission. And petitioners then give an example of a possible case where a shipper of lumber might find it to his interest to use a route over which the published through rates were not applicable.

Petitioners here are simply trying to make the case they made before the Commission into a different case in this Court. As can be seen from an examination of the Com-

mission's reports (R. 13, 40), the petitioners raised no question under Paragraph (3) of Section 15 of the Interstate Commerce Act (49 U. S. C. A. Sec. 15 (3), Appendix A), under which the Commission possesses the power to require railroads to establish through routes that the Commission finds necessary or desirable in the public interest, and to fix the rates over such routes. There was an ample number of routes from the lumber shipping points in question to destinations in the North over which the published through rates applied (R. 56). There is not the slightest suggestion in the Commission's reports that petitioners forwarded their shipments via the routes over which the published through rates were not applicable in order to enable petitioners to obtain a stoppage-in-transit privilege at an intermediate point. No such question was presented to the Commission as the Commission's reports show. Petitioners forwarded their shipments over the combination routes over which the published through rates were not applicable in the hope and expectation that they could, by the strained construction they have sought to place upon the combination rule, cut the published through rate. The case was not at all one involving the reasonableness of routes, but as shown by the reports of the Commission, one involving the construction to be placed upon the language of a tariff rule. The petitioners were not interested in transit privileges on any of the roads. They made no point respecting those privileges. They were interested in obtaining, through an unlawful construction of the combination rule, reductions in the published through rates.

Petitioners quote a paragraph from the Commission's report (R. 48) which concludes with a statement by the Commission that it does not consider that the particular circumstances of these cases justified the use of routes over which the higher rates are applicable. But the Court will see from a reading of the particular page of the Com-

mission's report on which this sentence appears (R. 48) that the Commission was there dealing with unrouted shipments. These respondents forwarded the unrouted shipments via the routes over which the published through rates were applicable. If petitioners' construction of the combination rule is right, then lower rates were available via the routes over which the combination basis of rates applied, which combination basis when reduced by the application of the combination rule, would result in a lesser rate than the published through rate. Under these circumstances, and assuming the correctness of the petitioners' construction of the combination rule, it would be the duty of these respondents to forward unrouted shipments via the routes over which the lowest rates applied.

But the Court can see that this question of misrouting turns upon the correctness of the construction of the combination rule made by the Commission, and we get back to the question therefore whether that construction was lawful. The Commission, in stating (R. 48) that it did not consider that the particular circumstances justified the use of the routes over which the higher rates were applicable, assumed the correctness of its construction of the combination rule, under which the published through rates were higher than the combination rates applying via the combination routes, when those combination rates were treated by the application of the combination rule. The Commission recognized this point earlier in its report (R. 42, 43) when it said that:

> "The alleged misrouting is dependent upon the question of tariff interpretation, and that question therefore presents the principal issue for determination."

Respondents are sure it will be conceded that if they are right in their construction of the rule there was no misrouting, and they concede that if they are wrong there was misrouting.

Petitioners argue (p. 17) that the Circuit Court of Appeals recognized (opinion, R. 74) that

> "an understanding of the point in dispute requires exposition of its historical setting."

And petitioners argue that this is conclusive that the question goes beyond the mere interpretation of the ordinary meaning of words.

But this Court will see that the Circuit Court of Appeals merely sought to ascertain the reason for the rule, a natural inquiry. These respondents submit that there is nothing in the language of the rule, in its history, its purpose, or its application that envelopes it in such mystery and shrouds it in such recondite meaning as to make it impossible for a court of justice to understand the purpose or the meaning of the rule.

Petitioners lay great stress upon the decision of this Court in *Standard Oil Company* v. *United States,* 283 U. S. 235, in which this Court had before it an appeal from an order of the Interstate Commerce Commission dismissing two complaints filed with the Commission to recover damages for alleged overcharges. The Court said that it was evident from an inspection of the record, as the Commission said in its first report, that the cases concerned unusually complicated and technical tariff determinations, the proper determination of which called for the exercise of the trained judgment of that body of experts appointed by law and informed by experience. This Court, therefore, said that the order of the Commission being a negative one was not susceptible of review by courts.

But this Court went on to say that putting aside this ground entirely, it thought the District Court was without jurisdiction, that the Standard Oil Company, having elected to proceed to a determination before the Commission respecting the question whether it had been charged more than

the lawful rates provided for in the tariffs, was precluded from seeking reparation upon the same claims by an alternative method of procedure.

It only requires a reading of the decisions of the Commission in the cases that were the subject of the Standard Oil Company's suit (*Standard Oil Company (Indiana)* v. *Atchison, Topeka & Santa Fe Railway Company et al.*, 113 I. C. C. 597 and 139 I. C. C. 297), to see that they involved unusually complicated and technical tariff situations, wholly different from the tariff situation which is the subject-matter of this suit.

That the question in the case at bar involved no complicated and technical tariff situations is shown by the approach of the courts below to the question and their decisions thereon (R. 65, 74) as well as by the decisions of the Commission itself. (R. 40, 13.)

The Circuit Court of Appeals was right when it said (R. 76) that the Commission did not have before it any question of the reasonableness of rates, and that while the existence of through routes was involved, there was no controversy as to the fact and no question decided as to the reasonableness of routes, that the question was one of law, and that while great deference will be paid to the conclusions of the Commission, the courts are not bound by them.

THE COURTS BELOW WERE RIGHT IN THEIR CONCLUSIONS THAT THE LANGUAGE OF THE COMBINATION RULE IS CLEAR AND UNAMBIGUOUS AND THAT THE INTERSTATE COMMERCE COMMISSION ERRED AS A MATTER OF LAW IN CONSTRUING THE RULE AT PLAIN VARIANCE WITH ITS LANGUAGE.

The first question that confronts us in construing the combination rule is to determine whether there were published through rates in effect on the shipments of lumber

involved in this proceeding from the points of origin of those shipments to their destinations. This is a condition to the use of the rule. We pointed out in our statement that there were such published through rates in effect.

As stated by the District Court in its opinion (R. 65), at the time the shipments involved in the complaint moved, there were in existence between the points of origin and destination on all such shipments lawfully published through rates, and the routes over which these through rates applied were not under attack as being unreasonable or impracticable.

The condition stated in the rule having been considered, and a determination reached of the question whether published through rates were in effect from the points of origin in question to destination, it follows that the rule under the plain language of the tariff may not be applied to the shipments of lumber involved in this proceeding, on all of which shipments the published through rates were in effect, applying via the originating carrier and its connections to destination.

The language of the combination rule is plain. It is unambiguous. There is not a word in the rule used in other than its ordinary sense. The rule means just what it says and ought to be interpreted just as it reads. There is nothing technical about the rule. It does not contain one technical word. It is clearly and simply stated in simple language.

Tariffs are not framed by lexicographers. Nor are they framed by men given to expressing their language in recondite phrases. They are framed by men who endeavor to express the purpose and intent of the rule in the plainest, simplest, clearest language possible. The language of the combination rule is characterized by clarity, simplicity and directness. The rules in tariffs must, moreover, be read

and applied by hundreds of persons whose duties require them to quote rates and collect freight charges. Where the language of a tariff rule is plain and unambiguous, the rule ought to be construed in accordance with the plain meaning of the language used. The rule ought to be construed as it would be construed by the ordinary man who is required by his daily work to construe and apply the rule. One reading of the combination rule is sufficient to disclose what it means.

What the Commission did in the construction that it placed on the combination rule was to write out of the rule the phrase "where no published through rates are in effect from point of origin to destination." The Commission had no right thus arbitrarily to write out of the tariff this qualifying phrase. The Commission may determine whether a rate or a practice or a rule is unreasonable or unjustly discriminatory or preferential or unduly prejudicial, and thus in violation of law; but when it construes a tariff rule for the purpose of determining the meaning of the rule, it must take the rule as written. It has no more power in such a case to rewrite the rule than a court, in dealing with the construction to be placed upon a statute, has the power to rewrite the statute.

It has been held by the courts that in the construction of railroad freight tariffs, as in the construction of statutes, effect is to be given, if possible, to every word, clause and sentence. (*Pillsbury Flour Mills Co.* v. *Great Northern Ry. Co.*, (C. C. A., 8) 25 Fed. (2d) 66; *Chicago Great Western R. R. Co.* v. *Farmers' Shipping Assn.*, (C. C. A., 10) 59 Fed. (2d) 657; *Updike Grain Corporation* v. *St. L. S. F. Ry. Co.*, (C. C. A., 8) 52 Fed. (2d) 94.)

The Commission by its construction of the combination rule failed to give effect not only to a word or two, but to a clause that qualifies the rule itself and limits its application.

The Circuit Court of Appeals for the Fifth Circuit in *Western Grain Co.* v. *St. L. S. F. Ry. Co.*, 56 Fed. (2d) 160, said that tariffs must be applied as written. The Commission has wholly failed to apply the combination rule as it was written and as it appears in the tariff.

A reading of the combination rule discloses that it is expressed in such clear terms that the ordinary business man can understand it, a test suggested in *Atlantic Bridge Co.* v. *Atlantic Coast Line Railroad Co.*, 56 Fed. (2d) 163.

If the language of the combination rule be construed in accordance with the meaning of the words used, words that are simple and non-technical, the construction placed by the Commission on the rule cannot be sustained.

Petitioners argue (p. 38) that any ambiguity or doubt as to the meaning of the tariff in question must be resolved against the carriers, and they cite cases which announce the rule that since the tariff is written by the carrier all ambiguity or reasonable doubt as to its meaning must be resolved against the carrier. Respondents do not dispute the correctness of this principle. But it only requires a reading of the rule to see, as the District Court found, that there is no ambiguity in the language, that it does not give rise to any reasonable doubt. The language is just as clear as a bell, and means just what it says and says just what it means.

Petitioners also argue (p. 40) that the respondents admit that something in addition to the words appearing in the rule must be read into the rule and that these words are:

> "The published through rate must apply over the line of the initial carrier."

This is precisely what the rule says. Nothing is required to be read into the rule. No words are required to be added to the words that go to make up the rule.

A shipper of lumber tenders his shipment to an agent of a railroad at the point of origin for movement to a destination in the North. Under the rule the first question the agent must determine in order to ascertain the lawful rate is whether there is a published through rate in effect from that point of origin *via that railroad* and its connections to the destination. If there is a published through rate, then the combination rule has no application. If there is no published through rate, and the through charge is made up of the combination of local rates of the carriers making up the through route, then the combination rule comes into play, and the shipper through the use of the combination rule is protected from the payment of more than one increase in the rate. The rule is simplicity itself both in its language and in its operation. Petitioners overlook the fact that the combination rule is the rule of the initial carrier as well as of other carriers that are parties to the tariff naming the combination rule, and that it is the initial carrier speaking for itself and its connections when it says that when no published through rates are in effect via its line from the point of origin, the through rate will be determined in the manner specified in the rule.

What the petitioners really sought to accomplish was to persuade the Commission to insert in the rule the phrase "via the route of movement," so that the rule would read in substance that where no published through rates are in effect via the route of movement from point of origin to destination, the rule would apply. But this is not what the rule says. The rule, and it must be borne in mind that it is the initial carrier speaking through its tariffs, says that where there are no published through rates in effect from the point of origin of the shipment tendered to the initial carrier for transportation to the destination of that shipment, the combination rate will be arrived at in the manner specified in the rule.

What this Court said in a recent case, *United States* v. *Missouri Pacific R. R. Co.*, 278 U. S. 269, in which the court found that the Commission had misconstrued Paragraph (4) of Section 15 of the Interstate Commerce Act (49 U. S. C., Sec. 15(4)), applies with equal force to the present case. The court there said (pp. 277-278):

> "The language of that provision (Paragraph (4) of Section 15) is so clear and its meaning so plain that no difficulty attends its construction in this case. Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. It is elementary that where no ambiguity exists there is no room for construction. Inconvenience or hardships, if any, that result from following the statute as written must be relieved by legislation. It is for Congress to determine whether the Commission should have more authority in respect of the establishment of through routes. Construction may not be substituted for legislation. * * *"

A reading of the combination rule discloses that its language is so clear and its meaning so plain that no difficulty attends its construction. Adherence to its terms leads to nothing impossible or plainly unreasonable. The Commission was, therefore, bound by the words employed, and was not at liberty to conjure up conditions to raise doubts in order that resort might be had to construction. Where no ambiguity exists there is no room for construction. The Commission of course has the power upon proper complaint and following a hearing to pass upon the reasonableness of not only the rates and the charges of interstate carriers, but their tariff rules, regulations and practices. But there was no such issue before the Commission in this proceeding. The Commission was not asked to pass upon the reasonableness of the combination rule or its lawfulness under any of the sections of the Interstate Commerce Act. It was called

upon only to construe the rule and to determine whether the carriers had lawfully construed and applied the rule. Construction may not be substituted for legislation.

The reasoning of the Circuit Court of Appeals on the construction of the rule, (R. 76, 77, 78) the real and fundamental point in the case, is unanswerable. These petitioners and the Commission have sought to turn simplicity in language into complexity, in the face of the fact that no complexity existed. They have sought to conjure up conditions and to raise doubts where neither conditions nor doubts existed.

The District Court was right in concluding that the combination rule was clear and unambiguous, requiring no construction (R. 66), and the Circuit Court of Appeals was right in saying (R. 76) that the language appears to be clear enough, and that there is absent any express qualification thereon. The judgment of these courts should be affirmed.

THE DECISION OF THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA IN BALTIMORE & OHIO RAILROAD COMPANY v. DOMESTIC HARDWOODS, INC., 65 Fed. (2d) 448, IS UNSOUND, AND THE COURTS BELOW WERE RIGHT IN REFUSING TO FOLLOW IT.

Petitioners rely upon the decision of the Court of Appeals of the District of Columbia in *Baltimore & Ohio Railroad Company* v. *Domestic Hardwoods, Inc.*, 65 Fed. (2d) 448, in which the Court of Appeals construed the combination rule as the Interstate Commerce Commission construed it. Petitioners state (p. 48) that the direct conflict between the decision of the Court of Appeals of the District of Columbia and the decision of the Circuit Court of Appeals for the Sixth Circuit in the case at bar, was the prin-

cipal ground urged in the application for the writ of certiorari.

Respondents submit that the decision of the Court of Appeals in the *Baltimore & Ohio Case* is unsound for the following reasons:

The court in the first place erred as a matter of law in construing the combination rule as it did and in upholding the construction placed by the Commission upon that rule. The plain and unambiguous language of the rule, for the reasons heretofore stated, will not permit or justify the construction placed by the Commission and the court upon the rule.

It is clear, in the second place, that the Court of Appeals of the District of Columbia felt that the decision of the Commission was controlling, and that the court should not exercise its own and independent judgment as to whether the Commission's construction of the combination rule was lawful. The court said (p. 492) that the carriers took the position that the Jones rule (the combination rule) is applicable only where there is no joint through rate via any route, that this the Commission held was not the correct interpretation, and that the court found itself in agreement with the Commission's conclusion,

> "though it is fair to say, if the question were one as to which the Commission had made no ruling, the determination would present more difficulty, for the language is undoubtedly broad enough to be construed as contended by carriers. * * *"

The court went on to say that the question involves more than the mere interpretation of words, that it really goes to the interpretation and construction of railroad rates and routing, a technical subject, and as to which the Commission is presumed to have and does have expert knowledge superior to that possessed by any court. The language of the court indicates that it treated the question as one of

complexity, notwithstanding the fact that the language used in the combination rule is plain and unambiguous, and considered the question one in which it should put aside its own judgment and accept that of the Commission.

The Circuit Court of Appeals in the case at bar said (R. 79) that the Court of Appeals followed the Commission's ruling on the theory that the question involved a technical subject on which the Commission was presumed to have expert knowledge, superior to that of the court, but that it, the court below, perceived no inherent technical question in determining whether the rule means what it says.

The Court of Appeals then set forth some reasons why in its opinion the Commission's construction of the combination rule was not strained, unreasonable, or unnatural (p. 492). An analysis of these reasons will show that each one of them is unsound.

The court said it is conceivable that a through rate might be established covering a route several hundred miles longer than some other route, or over a route through congested centers, the use of which would delay the shipment. But there was no contention in the *Baltimore & Ohio Case* or in the present proceeding that the through, single-factor routes that had long been established in such numbers and over so many different routes applied over routes that were unreasonably long.

The court further said that if the shipment be conceived of as perishable, this through rate would obviously not be available for such class of shipment, and that in such a case to say that because of this unusuable through rate and route the rule which would otherwise apply would not apply would be an anomaly.

There is no question in this case, nor was there such a question in the *Baltimore & Ohio Case,* of rates applying on perishable freight, or the reasonableness of the routes

over which such rates applied. The court in its efforts to suggest reasons to support the Commission's construction of the combination rule, has overlooked the fact that if the through routes maintained by the carriers over which the through, single-factor rates are now in effect are unreasonably long, whether or not the shipment be perishable, the Commission has the power to require the carriers to establish additional through routes whenever such routes are found necessary or desirable in the public interest, and the power to fix the rates via such routes (Paragraph (3) of Section 15 of the Interstate Commerce Act, 49 U. S. C. A. Sec. 15 (3)).

The court also overlooked the fact that the question presented was not whether the routes over which the published through rates applied were unreasonably long, or applied through congested centers, a question wholly addressed to the administrative powers of the Interstate Commerce Commission, but whether the Commission's construction of a written tariff rule was justified by the language of the rule itself.

The court also said that the combination rule was created and adopted to avoid inequality as well as excessive rates, and to maintain a harmonious rate adjustment, that without it shippers using the combination rates would be required to pay more ordinarily than those who were able to use the through rates, and that the rule thus avoided this inequality. But the court, in upholding the Commission's construction of the rule, thwarted the very purpose of the rule as stated by the court.

The court was right when it said that without the rule, shippers using the combination rates would be required to pay more ordinarily than those able to use the through rates. The court overlooked this controlling fact: that the shippers had published through rates from the points of

origin from which their shipments were made. The rule was not intended to protect shippers who, to use the court's language, "were able to use the through rates." It was intended to bring about an equality in so far as advances in rates were concerned between shippers who had available published through rates from the points or origin from which their shipments were made, as had the petitioners in the case at bar, and whose rates, therefore, included but one increase, and shippers located at points of origin from which no published through rates were in effect and who, in the absence of the combination rule, would have been required to pay an increase in each factor of the combination rate. If there were three factors making up the combination rate, the shipper would have been required to pay a triple advance as compared with a single advance only in the case of the shipper who had published through rates from his point of origin. It was, therefore, a distortion of the plain and unambiguous language of the rule to apply it for the benefit of those shippers, to use the language of the Court of Appeals of the District of Columbia, "who were able to use the through rates." This construction destroys the very equality that the rule was intended to accomplish.

Moreover, the rule as construed by the Commission and the Court of Appeals of the District of Columbia establishes the very inequality that the court in the *Baltimore & Ohio Case* said the rule was created to avoid. It destroys harmony in the rate adjustment. We point out elsewhere in this brief that under the rule as construed by the Commission, a shipper at an intermediate point nearer the destination would actually pay a greater rate than the shipper located at the more distant point, thus creating violations of the long-and-short-haul clause of Section 4 of the Inter-

state Commerce Act. What equality, for example, can there be in construing the combination rule in such a way as to enable a shipper located at Laurel, Miss., to transport his shipments to Columbus, Ohio, at a rate of 40½c, while a shipper of the same commodity located at Ackerman, an intermediate point and a point nearer to Columbus, forwarding his shipments over the same line or route, would pay a rate of 41½c? (R. 61).

It is clear that the court in this case has facts before it which distinguish the case from the *Baltimore & Ohio Case,* and throw an entirely different light on the question as to how the combination rule should be construed. The court in that case did not have before it facts which showed that the combination rule as construed by the Commission would have resulted in violations of the long-and-short-haul clause of Section 4 of the Act, and had no occasion theretofore to consider the principle announced by the Supreme Court in *Great Northern Ry. Co.* v. *Delmar Co.,* 283 U. S. 686. These facts alone distinguish the *Baltimore & Ohio Case* from the present case.

The court in the *Baltimore & Ohio Case* also said (p. 492) that if the establishment of a through rate made the combination rule ineffective, as the carriers contended it did, the carriers could in all cases of combination rates avoid the rule by establishing a through rate impossible in practical use, that the Commission who knew about such matters had avoided this result by refusing to allow it to be done, and that nothing presented to the court impelled it to a contrary view.

The court here overlooks the fact that the Commission did not have before it any issue respecting the reasonableness of the routes, their length, circuity, or the number of

carriers participating in them or of the published through rates. No issue was raised which called for the administrative discretion of the Commission with respect to the establishment or maintenance of routes or their reasonableness.

But assume that the carriers sought to establish a through rate impossible in practical use. Would the remedy of the shippers be found in the combination rule? Not at all. The court in suggesting this particular reason wholly overlooked the power that the Interstate Commerce Commission possesses under Paragraph (3) of Section 15 of the Act (49 U. S. C. A. Sec. 15 (3) Appendix A) to establish through routes whenever it finds such through routes necessary or desirable in the public interest and to fix the rates, as well as the power under Paragraph (7) of the same section (49 U. S. C. A. Sec. 15 (7)) to suspend any new individual or joint rate pending the Commission's investigation as to its lawfulness. The court dealt with the case as if it involved the reasonableness *per se* of the combination rule. The court overlooked the fact that the case did not call for the exercise of the administrative discretion of the Commission, and that the case presented the sole question of the proper interpretation of the language in the combination rule, a question of law alone.

The court in the *Baltimore & Ohio Case,* to paraphrase the language of the Supreme Court in *United States* v. *Missouri Pacific R. R. Co.,* 278 U. S. 269, in which the court held that the construction placed by the Commission upon Paragraph (4) of Section 15 of the Interstate Commerce Act (49 U. S. C. A. Sec. 15 (4)) was erroneous, conjured up conditions to raise doubts in order that resort may be had to construction, when the language was so clear that there existed no room for construction. (pp. 277-278).

Respondents submit that the decision in the *Baltimore & Ohio Case* is not conclusive of the case at bar, that when that decision is examined in the light of the facts in that case and the reasons given by the court for its opinion therein, and in the light of the facts in the case now before this court, it will be found that the court did not lawfully construe the rule, and that there are facts in the case at bar which distinguish it from the *Baltimore & Ohio Case.*

It will be seen from the foregoing that the Circuit Court of Appeals in the case at bar was right in its refusal to follow the reasoning of the Court of Appeals of the District of Columbia in the *Baltimore & Ohio Case.* The court below pointed out (R. 78) that the Court of Appeals in the *Baltimore & Ohio Case* overlooked the fact that the power of the Commission over reasonable rates did not lie in the combination rule but in the power of the Commission to establish routes and to fix rates under Paragraph (3) of Section 15 of the Interstate Commerce Act (49 U. S. C. A. Sec. 15 (3)).

This point was recognized by the recent decision of the Circuit Court of Appeals for the Second Circuit construing another portion of the combination rule,[1] in which that court said (p. 115):

> "* * * If the sum of the individual rates of the several carriers made an unreasonable charge for the carriage, the Commission had ample power, either upon complaint or upon its own initiative, to establish through rates, joint classifications and joint rates, and to provide for division of the charges between the carriers. (49 U. S. C. A. Sec. 15 (3))."

Respondents submit that the courts below were right and that the Court of Appeals in the *Baltimore & Ohio Case* was wrong in the construction placed upon the combination rule.

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(1) *Hygrade Food Products Corporation* v. *C. M. St. P. & P. R. R. Co.*, 85 Fed. (2nd) 113.

THREE CIRCUIT COURTS OF APPEAL HAVE RECENTLY HELD THAT THE INTERSTATE COMMERCE COMMISSION ERRED AS A MATTER OF LAW IN FAILING TO CONSTRUE ANOTHER PORTION OF THE COMBINATION RULE IN ACCORDANCE WITH THE LANGUAGE USED.

Three different circuit courts of appeal have recently held that the Interstate Commerce Commission erred as a matter of law in failing to construe another portion of this same combination rule in accordance with the plain meaning of the language used. The Commission in the three cases that were the subject of these suits did precisely what it did in the case at bar: it failed to construe the language of the rule in accordance with the meaning of the words used. It failed to apply a plain and unambiguous tariff rule as that rule was written. The court in each case set forth the pertinent provisions of the combination rule and its purpose.

One of the limitations attached to the use of the combination rule, as shown by these decisions, is that it may be used only when the tariffs naming the freight rates themselves provide that those rates are subject to the rule. There is no question in the case at bar with respect to this particular limitation attached to the use of the combination rule.

Notwithstanding the plain language contained in this limitation, the Commission held in a long line of cases that the combination rule applied to the construction of rates over two or more carriers where no published through rate was in effect, if the tariff of one carrier alone contained a reference to the combination rule.

The Commission so held in the case of *Hohenberg* v. *Louisville & Nashville R. R. Co.*,[1] and awarded reparation based on its construction of the rule. The carriers refused to pay the award and Hohenberg brought suit on the award.

(1) 112 I. C. C. 325; 118 I. C. C. 157; 153 I. C. C. 402.

The Circuit Court of Appeals for the Fifth Circuit, however, in affirming a judgment in favor of the defendant carriers, said in part (*Hohenberg* v. *Louisville & Nashville R. R. Co.*, 46 Fed. (2d) 952, p. 955) :[2]

> "Turning then to the construction of the tariff in controversy, which hinges upon the applicability of the Jones-Kelley rule, *it is apparent from reading the rule* that it is not applicable except to rates contained in the tariffs where specific reference is made to it.
> * * * As the cotton was shipped out under a tariff that made no reference to the Jones-Kelley rule, and did not contain the 18-cent increase, the rule is not applicable." (Italics ours.)

The court here construed the language of the rule just as it read.

Precisely the same question was before the Circuit Court of Appeals for the Eighth Circuit in *Wheelock et al.* v. *Walsh Fire Clay Products Co.*, 60 Fed. (2d) 415. The court quoted what we have just quoted from the decision in the *Hohenberg Case*, and said that it was in full accord with the views expressed therein, and that it would seem clear that the combination rule was not intended to be applied unless all factors of the combination were subject to the tariff.

The court in significant language called attention to the fact (p. 418) that the plaintiff—

> "was chargeable with notice of the provisions of all applicable tariffs, and hence it knew, in contemplation of law, that only the tariff of the initial carrier made reference to the Jones tariff. It knew that the connecting carriers were not parties thereto, and the Jones tariff itself gave notice that it was applicable only where the railroads, by appropriate powers of attorney or by concurrence in tariffs referring to the Jones tariff were subject to the provisions of that tariff. It had notice of all the rules and provisions contained in the Jones tariff."

This language has equal application to the petitioners in

(2) Certiorari denied, 284 U. S. 617.

the case at bar. Petitioners were chargeable under the law with notice of the provisions of all the tariffs applying on their shipments of lumber. They knew that the combination rule by its very terms, and by a condition written into the rule itself, could not be applied where published through rates were in effect from point of origin to destination. They knew that the purpose of the rule was to protect shippers who were located at points of origin from which there were no published through rates in effect. Published through rates were in effect from the points of origin from which petitioners made their shipments. They knew that if they routed their shipments from these points of origin over routes over which the published through rates did not apply, they would under the plain terms of the combination rule be required to pay the sum of the local rates, unaffected by that rule. They forwarded their shipments over the routes over which the combination basis of rates applied, in the face of the fact that they had lower published through rates in effect via the originating lines from the same points of origin to the same destinations. They were not misled or deceived by the language of the combination rule. What they sought to do was to obtain a construction of the rule wholly at variance with the purpose of the rule and without any support in the language of the rule. They made no effort to prove that the published through rates were unreasonable *per se*. They sought by a strained and forced construction of the combination rule, wholly unjustified by the language used, to obtain a lower rate than the published through rate.

And lastly we have the very recent decision of the Circuit Court of Appeals for the Second Circuit in *Hygrade Food Products Corporation* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Company, et al.*, 85 Fed. (2d) 113, in which the court again had presented to it the very same question as that presented in the *Hohenberg* and the *Walsh*

Fire Clay Products Company cases, and where it said that for the reasons given it had reached the same conclusion.

Petitioners in dealing with these cases say (p. 52) that they presented clearly a question of law, involving no question of fact or administrative policy, and that they are in no way in point here.

But this Court will see from an examination of these three cases that while they did not involve the construction of that part of the combination rule here under consideration, these three courts were called upon to do what the courts below in the case at bar were called upon to do: to construe a tariff rule the words in which were used in their ordinary sense. These three Circuit Courts of Appeals held that the Commission erred as a matter of law in failing to construe that part of the combination rule there under consideration in accordance with the meaning of the language used.

These respondents submit that the principle applied by these three Circuit Courts of Appeal that the rule should be construed in accordance with the plain meaning of the language used, has equal application to this case. When that principle is followed it will be seen that the decisions of the courts below in the case at bar were right.

THE FACT THAT THE INTERSTATE COMMERCE COMMISSION HAS LONG CONSTRUED THE COMBINATION RULE AS IT DID IN THE CASE AT BAR IS NOT CONTROLLING WHERE THAT CONSTRUCTION IS CONTRARY TO THE PLAIN MEANING OF THE RULE.

THE QUESTION BEFORE THE COURT IS NOT WHAT CONSTRUCTION THE CARRIERS OR SOME OF THEM AT ONE TIME PLACED UPON THE COMBINATION RULE, BUT THE LAWFUL CONSTRUCTION OF THAT RULE.

Petitioners argue (p. 30) that the construction placed by the Commission upon the combination rule should be sustained because this construction has long been followed and has become a settled administrative construction. Cases are cited to the effect that an administrative ruling giving a practical interpretation of an ambiguous or doubtful statute will not be disturbed except for the most cogent and weighty reasons where, as here, the ruling has long been adhered to.

Petitioners cite a long list of cases in which the Interstate Commerce Commission construed the combination rule as it construed it in this case. But these cases only illustrate the long continued opposition of these respondents to the construction placed by the Commission upon the rule. The first of these decisions cited by petitioners, *McGowan-Foshee Lumber Company* v. *A. F. & G. Ry. Co.*, 95 I. C. C. 451, was decided as far back as January 12, 1925 and involved a shipment moving in 1921.

These respondent railroads, as can be seen from a review of the cases, have consistently and persistently opposed the construction placed by the Commission upon the combination rule, believing it to be wrong as a matter of law.

The courts below upheld the contentions of these respondents that the language of the combination rule was clear (R. 66, 76). These respondents submit, therefore,

that the principle urged by the petitioners has no application. As stated by this Court in *United States* v. *Missouri Pacific Railroad Company,* 278 U. S. 269, in which the Court found that the Commission has misconstrued Paragraph (4) of Section 15 of the Interstate Commerce Act (49 U. S. C. A., Sec. 15 (4)), it is elementary that where no ambiguity exists, there is no room for construction, that courts are bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction (p. 278).

This Court said in the case just cited that it has been held in many cases that a definitely settled administrative construction is entitled to the highest respect, and if acted upon for a number of years will not be disturbed except for cogent reasons, but that the rule does not apply in cases where the construction is not doubtful (p. 280).

Petitioners refer (p. 34) to the amendment to their petition in which they state that for several years after 1920 the rail carriers applied the combination rule to shipments of lumber from the South, that in 1923 the southern railroads for the first time took the position that the rule did not apply in cases where there was a through rate by any route, and undertook to amend their tariffs to specifically so provide, but the Commission declined to permit such an amendment.

Petitioners state that on demurrer this allegation must be taken as true, and they refer to what the Commission said in its report in *Cancellation Rule for Combination Rates on Lumber,* 93 I. C. C. 614 (decided December 2, 1924), that both the carriers and the shippers in the past had put a different construction on the application of the rule from that there contended for by the carriers.

The carriers, ever since the rule has been in effect, have of course applied the rule to shipments of lumber where

the rule by its language was applicable. Whether some of the carriers at one time construed the rule at variance with the plain and clear language of the rule is immaterial.

As just stated, petitioners themselves cite a long list of cases in which the railroads have persistently over a period of many years questioned the construction placed by the Commission on the combination rule, and insisted that the rule should be construed as the respondents here contend it should be construed and as the court below found it should be construed. The earliest of these cases was decided as far back as January, 1925, and involved a shipment moving in 1921.

The Commission itself had said that the fact that for approximately twenty-five years carriers and shippers have interpreted a tariff uniformly, is not conclusive that the interpretation is correct, but is entitled to consideration (*Thames & Co.* v. *Chesapeake & Ohio Ry. Co. et al.*, 194 I. C. C. 188, p. 189). The Commission has also said that a reasonable doubt concerning the meaning of transit tariffs warrants the interpretation which has been placed upon them by the parties (*Parkersburg Rig & Reel Co.* v. *Chicago & Northwestern Ry. Co.*, 198 I. C. C. 709, p. 712). But here no reasonable doubt can arise with respect to the meaning of the combination rule. An unlawful construction by either carriers or shippers of a tariff rule, plain and unambiguous in its language, does not make such construction by either shippers or carriers the lawful one. The question here before the court is whether the language of the combination rule admits of any possible ambiguity. The court here has before it a tariff rule which, as the courts below found, is clear and unambiguous and should under such circumstances be construed as written.

As stated by the Circuit Court of Appeals in its opinion (R. 77):

> "Freight tariffs must * * * be applied as written * * * and effect must be given to every word, clause and sentence. * * * The practical construction of the parties to a contract is not permitted to defeat the clear language of the instrument. * * * Where there is no occasion for construction, the court will be less hesitant to overturn a prior understanding even though it may have been acted upon for many years."

The court then cited the opinion of this Court in *United States* v. *Missouri Pacific Railroad Company*, 278 U. S. 269, p. 280.

A longer list of decisions of the Interstate Commerce Commission might be cited[1] in which that Commission construed another part of the combination rule in such a way as to lead three different Circuit Courts of Appeals[2] to reach the conclusion that the Commission erred as a matter of law. And those three Circuit Courts of Appeals reached

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(1) *Combination Rates on Agricultural Limestone*, 78 I. C. C. 579.
Combination Rule on Lumber, 93 I. C. C. 279.
Continental Oil Co. v. *Director General*, 109 I. C. C. 289.
Ladd Lime & Stone Co. v. *L. & N. R. R. Co.*, 109 I. C. C. 251.
Calif. Cotton & Factorage Co. v. *Director General*, 109 I. C. C. 293.
Thompson, Weinman & Co. v. *N. Y. N. H. & H. R. R. Co.*, 112 I. C. C. 65.
Montgomery Cotton Exchange v. *L. & N. R. R. Co.*, 118 I. C. C. 157.
Dann-Gerow Co. v. *A. C. L. R. R. Co.*, 120 I. C. C. 123.
Armour & Co. v. *C. & N. W. Ry. Co.*, 120 I. C. C. 737.
Allen Gravel Co. v. *C. R. I. & P. Ry. Co.*, 123 I. C. C. 650.
Wash. Building Lime Co. v. *B. & O. R. R. Co.*, 126 I. C. C. 9.
Potosi Tie & Lumber Co. v. *S. & E. R. R. Co.*, 128 I. C. C. 41.
Standard Oil Co. v. *A. T. & S. F. Ry. Co.*, 139 I. C. C. 297.
Wisconsin Lime & Cement Co. v. *A. T. & S. F. Ry. Co.*, 148 I. C. C. 599.
Vogt & Sons v. *C. B. & Q. R. R. Co.*, 181 I. C. C. 152.
Schofield Bros. v. *A. A. R. R. Co*, 159 I. C. C. 339.
Schimmel v. *B. & O. R. R. Co.*, 171 I. C. C. 791.
Ashby Veneer & Lumber Co. Inc. v. *D. & R. G. W. R. R. Co.*, 200 I. C. C. 472.

(2) *Hohenberg* v. *L. & N. R. R. Co.*, 46 Fed. (2d) 952, certiorari denied, 284 U. S. 617; *Wheelock, et al.* v. *Walsh Fire Clay Products Co.*, 60 Fed. (2d) 415; *Hygrade Food Products Corporation* v. *C. M. St. P. & P. R. R. Co.*, 85 Fed. (2nd) 113.

this conclusion notwithstanding the long line of cases in which the Commission had held to the contrary.

Petitioners argue (p. 31) that a reversal of this long established administrative construction by the Commission would produce inconvenience and result in inequality, thereby destroying the uniformity which this Court has said is the paramount purpose of the Interstate Commerce Act, and that if the Court applies the rule that consideration should be given as to how the tariff would operate as a matter of justice, the construction by the Commission must be sustained.

These respondents submit that the petitioners are in no position to urge any such contentions. The purpose of the combination rule was to protect shippers who were shipping lumber from points from which no published through rates were in effect and who, had it not been for the combination rule, would have been required to pay double and sometimes triple increases in their rates, while their competitors, located as petitioners were at points from which published through rates were in effect, would have been required to pay but one increase in their rates. Petitioners, therefore, did not need the protection of the combination rule. Having published through rates in effect from all the points of origin from which their shipments were made, they paid but one increase in the total rate.

The fact of the matter is that petitioners are here seeking to turn a rule which was intended as a shield to protect those shippers located at points of origin from which no published through rates were in effect from double and triple increases in their rates, into a sword to enable petitioners, through a strained and forced construction of the combination rule, to obtain lower rates than the published through rates, the reasonableness of which they dared not attack in this proceeding, and the reasonableness of which

when they did attack them, was upheld by the Commission (*Southern Pine Assn.* v. *A. & W. R. R. Co.*, 183 I. C. C. 191). The construction which petitioners seek to give to this rule, to use the language of the Court in *Hohenberg* v. *Louisville & Nashville Railroad Company*, 46 Fed. (2d) 952, (p. 955):

> "* * * would do violence both to the letter and intent of the rule and produce wholly inequitable results."

Petitioners here ask this Court to approve a construction of the combination rule under which these petitioners, all shipping lumber from points of origin from which published through rates were in effect, allegations with respect to the reasonableness of which rates petitioners withdrew at the hearing in this case (R. 42), would obtain reductions in those published through rates. Such a construction would result in the petitioners paying less than the single increase in the published through rates, while their competitors at other points from which points published through rates were not available, would pay one increase in full.

The published through rate on lumber from Laurel, Mississippi to Columbus, Ohio, for example, was 43 cents (R. 56). Petitioners do not attack the reasonableness *per se* of this rate (R. 42). This rate of 43 cents reflected but one increase in the total through rate. But if petitioners are right in their construction of the rule, this published through rate of 43 cents would be reduced to 40½ cents (R. 57). Petitioners' competitors located at points from which no published through rates were in effect would pay in full the single increase in the rate, while petitioners by this strained and forced construction of the rule would obtain a reduction in their rate.

It can readily be seen that if this case is to be decided on the question of how the rates claimed will operate as a matter of justice, as urged by the petitioners, the construction of the rule for which these respondent carriers

have contended all these years should be upheld. Justice will not be done if the rule is construed otherwise than in accordance with the plain meaning of the words used in the rule.

Petitioners go on to say (p. 33) that under the construction contended for by these respondents, if a shipper used the combination rate, in many cases he would pay double increases, and that if he shipped by the route via which the published through rate applied, he would be deprived of the use of routes which all agree are reasonable routes. No shipper would pay double increases provided he routed his shipments via routes over which the published through rates applied, for those published through rates included but one increase. That the routes over which the published through rates applied were ample in number is shown by the fact (R. 56) that from Laurel, Mississippi to Columbus, Ohio, there were 150 different routes over which the published through rate of 43 cents applied. These petitioners never contended before the Commission that the routes over which the published through rates applied were insufficient in number or inadequate for some reason or other. If the petitioners believed that an additional number of through routes should be established over which the published through rates applied, they could have invoked the power that the Commission possesses under Paragraph (3) of Section 15 of the Interstate Commerce Act (49 U. S. C. A. Sec. 15 (3)) to establish through routes when it finds such through routes necessary or desirable in the public interest, and to fix the rates over such routes. Petitioners raised no such issue.

The Court will see that the case before the Commission did not involve any question of the reasonableness of the routes or the exercise by the Commission of its power under Paragraph (3) of Section 15 to require these respondent railroads to establish through routes. The case as pre-

sented by these petitioners involved but one question alone: the proper and lawful construction to be given a rule in a railroad freight tariff.

THE CONSTRUCTION PLACED BY THE INTERSTATE COMMERCE COMMISSION UPON THE COMBINATION RULE WOULD HAVE RESULTED IN VIOLATIONS OF THE LONG-AND-SHORT-HAUL CLAUSE OF SECTION 4 OF THE INTERSTATE COMMERCE ACT, AND WAS THEREFORE UNLAWFUL.

For the reasons stated elsewhere in this brief, respondents submit that no doubt arises with respect to the construction to be placed upon the combination rule. The language of the rule is clear and unambiguous. It is to be construed and applied just as it reads. But if it be assumed that any possible doubt can arise with respect to the meaning of the rule, and that the rule is capable of two possible constructions, then it is clear under a recent decision of this Court that the Commission erred in adopting that construction of the rule which would have resulted in a violation of law.

In *Great Northern Railway Co.* v. *Delmar Co.*, 283 U. S. 686, the Court had before it an order of the Interstate Commerce Commission awarding reparation against the Great Northern Railway Company for overcharges on interstate shipments of grain from points in western States to Superior, Wisconsin. The Great Northern had two routes from the points of origin to Superior, the shorter route via Willmar, Minnesota, and the longer route over which the cars in question traveled, via Minneapolis, Minnesota. Through rates were in effect from these points of origin to Superior, which rates were not restricted to apply via any particular route. The Great Northern took the position that when the shipments moved via Minneapolis, the longer route, the tariff should not be construed so as to render the through rate applicable via Minneapolis, but that the law-

ful rate was made up of the combination of the local rates on Minneapolis, which combination was higher than the through rate.

The Commission, however, sustained the contention of the Delmar Company that the through rates applied to the shipments routed via Minneapolis as well as those routed Willmar, since the tariff did not expressly restrict their application to the shorter and more direct route via Willmar. The Commission held that overcharges had been collected and awarded reparation. The application of the through rates to shipments moving via Minneapolis resulted in violations of the long-and-short-haul clause of Section 4 of the Interstate Commerce Act (49 USCA Sec. 4), in that the rates from the points of origin to intermediate points on the same line or route were greater than the rate to the more distant point, Superior.

This Court said in its conclusion (pp. 690-691):

> "The railway can transport the shipments over the shorter and customary route without violating Section 4; but if the tariff is construed to require it to take them over the longer route it must violate that section and incur the resulting penalties. In this situation we think the tariff should be construed as applying only to the shorter route, and not as giving the shipper the option between the two routes at the through rate. This conclusion is in accord with the principle that where two constructions of a written contract are possible, preference will be given to that which does not result in violation of law. Compare *Wilson* v. *Rosseau*, 4 How. 646, 685; *Hobbs* v. *McLean*, 117 U. S. 567, 576; *In Re Rose Co.*, 275 Fed. 409; *Northern Pac. Ry. Co.* v. *St. Paul & Tacoma Lumber Co.*, 4 Fed. (2d) 359.
>
> The judgment is reversed and the cause remanded for further proceedings in conformity with this opinion."

Let us apply the principle announced in this case to the facts in the present proceeding.

Respondents in the amendment to their answer (R. 60,

61) set forth instances of how the construction placed by the Commission on the combination rule would have resulted in violations of the long-and-short-haul clause of Section 4. If the Commission had construed the rule as the carriers contended it should be construed, no such violations of law would have resulted. The Commission itself in its report (R. 47) refers to the contention of the respondents that, if the tariffs had been applied as the petitioners contend, violations of the long-and-short-haul clause of Section 4 would have resulted, and the Commission itself gives an example of how these violations would have been brought about (R. 47).

All the facts were before the Commission. It had the choice of construing the combination rule in such a way as to avoid violations of the long-and-short-haul clause. It failed to do so. The decision of the Supreme Court in the *Delmar Case* makes it plain that in failing to do so the Commission erred.

Petitioners seek to avoid the effect of this decision by arguing (p. 43) that if the application of the combination rule results in violations of the Fourth Section in cases where there is a joint through rate from the same point of origin, it would necessarily result in a like violation in instances where there is no joint through rate from the point of origin, in which latter case the railroads admit that the combination rule applies, and that thus the contention of the railroads would destroy the rule in its entirety. There is nothing in the record that supports this contention, and a check of the tariffs shows that it is without any foundation in fact. The Commission's report does show on its face, as heretofore pointed out, that the application of the combination rule in accordance with the contentions of the petitioners, contentions that were sustained by the Commission, would have resulted in violations

of Section 4 (R. 47). It follows, therefore, that the decision in *Chicago Great Western Railroad Company* v. *Farmers' Shipping Company,* 59 Fed. (2d) 657, cited by petitioners, in which the court said that the argument there made was of little force because either construction of the tariff rule would result in a violation of Section 4, is not in point.

Petitioners furthermore seek to distinguish the *Delmar Case* and to overcome its plain effect by the decision of the Circuit Court of Appeals for the Fifth Circuit in *Beaumont, Sour Lake & Western Railway Company* v. *Magnolia Provision Company,* 26 Fed. (2d) 72. In that case the carriers, through an oversight or error on the part of either a printer or a clerk, had actually published in their tariffs in figures a rate of 23c. The carriers intended to publish a rate of 70c. The court was not called upon to construe the language in a tariff rule for the purpose of determining its meaning and ascertaining the lawful rate. The rate actually named in the tariff was 23c, and the Interstate Commerce Commission, as well as both the District Court and the Circuit Court of Appeals held, and very properly so, that proof of error in publishing the amount of the rates does not justify departure from the rate as actually published, even though the shippers had full knowledge that the rate was published by mistake and even though the published rate violated the long-and-short-haul clause of Section 4.

The question that was before the Commission and is now before the court in this proceeding is entirely different. The court is called upon to construe the language contained in a rule in the tariff in order to determine the lawful rate, and in construing the language of the rule, even if it be assumed that two constructions are possible, preference should be given to that construction which does not result in a violation of law.

Neither court below dealt with this point, the District Court stating (R. 66) that as the tariff is clear and unambiguous and is susceptible of only one meaning when the language thereof is given its ordinary and usually accepted meaning, there arises no occasion for the application of those aids to construction of statutes and rate tariffs resorted to by courts in those cases where the language is ambiguous or susceptible of more than one meaning.

The point we here make is that if, notwithstanding the plain meaning of the words used in the rule, two possible constructions could be suggested, the decision in the *Delmar Case* requires that the rule be construed in such a way as to avoid a plain violation of the law.

Petitioners in concluding their discussion of the point here considered, argue (p. 45) that the rule as construed by respondents would be clearly unlawful because in violation of Paragraph (1) of Section 6 of the Interstate Commerce Act (49 USCA, Sec. 6 (1)). This is the section that requires every common carrier to file with the Commission, print and keep open to public inspection its schedules showing its rates, fares, and charges for the transportation between different points on its own route and between points on its own route and points on the route of any other carrier, and requiring, furthermore, that the schedules shall plainly state the places between which the property shall be carried, and shall contain the classification of freight in force, and shall state separately all charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of the aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee.

Petitioners refer to the Commission's decision in *Can-*

cellation Rule for Constructing Combination Rates on Lumber, 93 I. C. C. 614, in which the Commission said that a serious objection to the tariff provision therein proposed was that it did not fully conform to the requirements of Section 6 of the Interstate Commerce Act, in that the restriction proposed made necessary a search of other tariffs in order to determine whether there were joint rates over any route before it could be determined whether the combination rule was applicable. Petitioners argue that the construction placed upon the rule by these respondents and by the courts below would result in violations of Paragraph (1) of Section 6 of the Act.

But the Court will see when it examines the report of the Commission that the Commission did not hold that the combination rule was an unlawful rule, that the Commission did not hold that the construction placed by these respondents upon the combination rule would result in the tariffs not conforming to Paragraph (1) of Section 6 in violation of that paragraph. The Commission construed only the language in the rule and found that the rule should be construed as these petitioners contend it should be construed. The Commission itself said in its first report (R. 42) that the alleged misrouting was dependent upon the question of tariff interpretation, and that that question presented the principal issue for determination. The question passed upon by the Commission was the meaning and application of the language used in the rule and not whether the tariff in question failed to show the rates, the places between which the property would be hauled or carried, and all privileges or facilities granted, and any rules or regulations which in any wise might change, affect or determine any part or the aggregate of the rates or the value of the service rendered by the shipper.

It is perfectly apparent from a reading of the Commission's reports in this case (R. 40, R. 13) that these

petitioners did not attack the lawfulness *per se* of the rule but attacked the construction placed by these respondents upon the language of the rule.

There is not the slightest suggestion in the record here before this Court that the petitioners ever contended before the Commission that they or any of them had any difficulty in determining whether there were published through rates applying on their shipments of lumber, and consequently in determining whether the combination rule applied. They knew that there were published through rates in effect from the stations from which they made the shipments involved in this case. They knew what the rates were. What they sought to do was to obtain such a strained and forced construction of the combination rule as would enable them to reduce the published through rates, the allegations with respect to the reasonableness *per se* of which rates they withdrew at the hearing with an exception not material here (R. 42).

The only thing that the petitioners asked the Commission to do was to construe the language used in the combination rule and to determine whether the rates collected by these respondents exceeded the lawful rates. The petitioners themselves stated in their petition in the District Court (R. 8) that the damage was caused by violations of the Interstate Commerce Act and "resulted from straight overcharges and/or misrouting."

We have heretofore pointed out as the Commission itself found (R. 42) that the alleged misrouting was dependent upon the question of tariff interpretation.

It will be time enough to consider whether the combination rule that has been in the tariffs since 1918 is unlawful and in violation of Paragraph (1) of Section 6 in that the tariff containing the rule does not show the rates, plainly state the places between which property will be carried,

and any rules which change, affect or determine any part of the rates or the value of the service, when the Commission in a case involving that precise question has passed upon the question. The Commission did not do so in the case at bar. It only construed the language used in the combination rule. This was all the petitioners asked the Commission to do, and they can not convert the case that they made before the Interstate Commerce Commission into a different kind of a case involving a different issue when they get into the courts.

Conclusion.

The language of the combination rule is characterized by such directness, clarity, and simplicity, its meaning is so clear, it is so wholly lacking in any ambiguity that, to use the language of this court in *United States* v. *Missouri Pacific Railroad Company,* 278 U. S. 269, there is no room for construction. The construction placed upon the rule by the Commission is at variance with its plain language and clear meaning.

The District Court and the Circuit Court of Appeals in their opinions in the case at bar (R. 65, 74) have each made an accurate and concise summary of the case and of the principles that should control its disposition.

These respondents respectfully submit that the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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